REMARKS

OF

THE HON. B. F. THOMAS,

OF MASSACHUSETTS,

ON

THE RELATION OF THE "SECEDED STATES" (SO CALLED) TO THE UNION, AND THE CONFISCATION OF PROPERTY AND EMANCIPATION OF SLAVES IN SUCH STATES,

IN THE HOUSE OF REPRESENTATIVES, APRIL 10, 1862.

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The House being in the Committee of the Whole on the State of the Union, Mr. THOMAS said, —

Mr. CHAIRMAN, — I avail myself of the indulgence of the Committee to make some suggestions upon subjects now attracting the attention of Congress and of the country, — the relation of the "seceded States" (so called) to the Union, the confiscation of property, and the emancipation of slaves, in such States. Sensible how deeply the interests of the country are involved in their right decision, I can only say, I have given to them careful and patient consideration, with an earnest hope and desire to learn what my duty is, and faithfully and firmly to discharge it.

The questions are novel as they are momentous. In the discussion of them, little aid can be derived from our own precedents, from the history of other nations, or from writers on constitutional and international law. The solution of the difficult problems of right and duty involved must be found in the careful study of the principles of the Constitution, and the just and logical ap- [illegible] to this [illegible] condition of things.

The peculiar feature of our civil polity is, that we live under written constitutions, defining and limiting the powers of Government, and securing the rights of the individual subject. Our political theory is, that the people retain the sovereignty, and that the Government has such powers only as the people, by the organic law, have conferred upon it. Doubtless these inflexible rules sometimes operate as a restraint upon measures, which, for the time being, seem to be desirable. The compensation is, that our experience has shown, that, as a general rule and in the long-run, the restraint is necessary and wholesome.

It is, I readily admit, by no narrow and rigid construction of the words of the Constitution that the powers and duties of Congress on these subjects are to be ascertained. Every provision must be fairly construed in view of the great objects the Constitution was ordained to effect, and with the full recognition of the powers resulting from clear implication as well as express grant. Designed as the bond of perpetual union and as the framework of permanent government, we should be very slow to conclude that it lacked any of the necessary powers for self-defence and self-preservation.

But recognizing the profound wisdom and foresight of the Constitution, and its adaptation to all the exigencies of war and peace, when a measure is proposed in apparent conflict with its provisions, we may well pause to inquire, whether, after all, the measure *is* necessary; and whether we may not bend to the Constitution, rather than that the Constitution should give way to us. When we make necessity our lawgiver, we are very ready to believe the necessity exists.

Nor are we to forget that the Constitution is a bill of rights as well as a frame of government; that among the most precious portions of the instrument are the first ten amendments; that it is doubtful whether the people of the United States could have been induced to adopt the Constitution, except upon the assurance of the adoption of these amendments, which are our Magna Charta, embodying in the organic law the securities of life, liberty, and estate, which, to the Anglo-Saxon mind, are the seed and the fruit of free government. Some portions of our history have led to the conclusion, that the existence of these amendments may, in the confusion of the times, have been overlooked.

In my humble judgment, Mr. Chairman, there has been, and is now, but one issue before the country; and that is, whether the Constitution of the United States shall be the supreme law of the land. That Constitution was formed by the *people* of the United States. It acts, not upon the States, nor, through the States, upon us as citizens of the several States, but directly upon us as citizens of the United States; claiming, on the one hand, our allegiance, and giving to us, on the other, its protection. It is not a compact between the States, or the peoples of the several States: it is itself a frame of government ordained and established by the people of the United States.

The sphere of the Government so established is indeed limited; but within that sphere its power is supreme. It is a Government of delegated powers; and the powers not delegated are reserved either to the States or to the people (Amendments, art. 10).

The powers and functions granted to the National Government by the Constitution are embraced in three

general classes, — those concerning the relations of the United States to foreign nations; those concerning the relations between the States and their citizens respectively; and certain powers, which, though belonging to the home-department of Government, to be useful and effective, must be general and uniform in their operation throughout the country. A very large proportion of the ordinary and necessary powers and functions of Government is left in the States. The powers of the National Government do not extend to or include the domestic institutions or internal police of the States. The separation and distinction between the respective spheres of the State and National Governments is an essential characteristic of our system, and is as old as the idea of Union itself. No Union was suggested, no project of one for a moment entertained, on any other basis. The Colonies, in authorizing their delegates to assent to a separation from Great Britain, and to form a Union for the general defence, expressly restricted them from consenting to any articles of union which should take from the Colonies the power over their internal police and domestic institutions. The resolutions of the Colonies of New Jersey, Maryland, and Rhode Island, may be cited in illustration.

The resolution of the Provincial Congress of New Jersey — passed June 21, 1776, and laid before the Continental Congress on the 28th of June — empowered the delegates of that Province to —

"Unite with the delegates of the other Colonies in declaring the United Colonies independent of Great Britain; entering into a confederation for union and common defence; making treaties with foreign nations for commerce and assistance; and to take such other measures as may appear to them and you necessary for these great

ends; promising to support them with the whole force of this Province; *always observing*, whatever plan of confederacy you enter into, *the regulating the internal police of this Province is to be reserved to the Colony Legislature*."

The Convention of the Colony of Maryland, by a resolution (adopted June 28, 1776, and laid before Congress July 1), authorized and empowered the deputies of the Colony to —

"Concur with the other United Colonies, or a majority of them, in declaring the United Colonies free and independent, in favoring such further compact and confederation between them, in making foreign alliances, and in adopting such other measures as shall be judged necessary for securing the liberties of America; and that said Colony will hold itself bound by the resolutions of the majority of the United Colonies in the premises; *provided the sole and exclusive right of regulating the internal government and police of that Colony be reserved to the people thereof*." — *Journals of Congress*, 1776, pp. 390, 391, 392.

The credentials of the Assembly of Rhode Island, after giving to the delegates power to enter into union and confederation, add, —

"Taking the greatest care to secure to this Colony, in the strongest and most perfect manner, its present established form, and all the powers of government, so far as relates to its internal police, and conduct of our affairs, civil and religious." — *Ibid.*, p. 343.

In the Revolutionary Government, in the Articles of Confederation, in the Constitution, in its judicious interpretation, in every administration under the Constitution, and in every department of the Government, the limitation has thus far been carefully recognized and faithfully kept. This familiar, well-settled doctrine, as to the independent respective spheres of the National and State Government, has never, perhaps, been more clearly and strongly stated than in one of the resolu-

tions adopted by the Convention which ushered the present administration into power : —

"*Resolved*, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depends."

It is expressed also, with clearness and strength, in the resolution adopted by the House, near the close of the last session of Congress, by a nearly unanimous vote : —

"*Resolved*, That neither the Federal Government, nor the people or governments of the non-slaveholding States, have a purpose or a constitutional right to legislate upon or interfere with slavery in any of the States of the Union."

These doctrines, as to the supremacy of the National Government within its sphere and of the reserved rights of the States, are elementary. Between them there is no necessary conflict. Each is the complement of the other, — both vital parts of that political system under whose admirable distribution and adjustment of powers the people of the United States have had for seventy years incomparably the best and most beneficent Government the world has ever known, — a Government now imperilled, not by reason of any inherent defect or any want of wisdom or foresight in its founders, not because we have outgrown its provisions, not because it is behind the age ; but because it has fallen upon an age not worthy of it, which has failed to appreciate the spirit of wisdom, prudence, and moderation, in which it was founded.

Such being the relation of the Government of the United States to its citizens and to the States, the first

question that arises is, how far this relation is affected by the fact that several of the States have assumed, by ordinances of secession (so called), to separate themselves from the Union.

The people of the United States, in and by the Constitution of the United States, established a National Government, without limitation of time, "for themselves and their posterity." It had been provided under the Articles of Confederation, that the Union should be perpetual. The Constitution was established to form "a more perfect union" than that of the Confederation; more efficient in power, and not less durable in time. There is not a clause or word in the Constitution, which looks to separation. It has careful provisions for its amendment, none for its destruction; capacity for expansion, none for contraction; a door for new States to come in, none for old or new ones to go out. An ordinance of secession has no legal meaning or force; is wholly inoperative and void. The Constitution, and the laws and treaties made under it, the people have declared, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." The act of secession, therefore, cannot change in the least degree the legal relation of the State to the Union. No provision of the Constitution of the United States, no law or treaty of the United States, can be abrogated or impaired thereby. No citizen of the United States, residing in the seceded States, is, by such ordinance of secession, deprived of the just protection of, or exempted from any of his duties to, the United States. In contemplation of law, the reciprocal duties of protection and allegiance remain

unaffected. After the act of secession, the province and duty of the Government of the United States are the same, according to the full measure of its ability, as before, — to enforce in every part of the Union, and over every inch of its territory, the Constitution and laws of the United States.

It is the necessary result of these principles, that no State can abdicate or forfeit the rights of its citizens to the protection of the Constitution of the United States, or the privileges and blessings of the Union which that Constitution secures and makes perpetual. The primary, paramount allegiance of every citizen of the United States is to the nation; and the State authorities can no more impair that allegiance than a county court or a village constable. Every proposition, however artfully disguised, which seeks to give any effect or vitality to an ordinance of secession, for evil or for good, is itself a confession of the right. To say that an act of secession is inoperative and void against the Constitution, and that this void act, sustained by force, is a practical abdication of the rights of the State under the Constitution, is to blow hot and blow cold, to deny and affirm, in the same breath; to state a proposition which is *felo de se.*

It is also the plain and necessary conclusion, from the principles before stated, that a *State* cannot commit treason. Under the Constitution of the United States, *persons* only can commit treason. How treason may be committed, and how tried and punished, the Constitution points out (Constitution, art. 3, sect. 3; Amendments, arts. 5 and 6). The persons who for the time being hold the offices under a State Government may individually commit treason; but the acts of the State

officers, transcending their authority and in conflict with the Constitution of the United States, involve in their guilt no man who has not himself levied war against the United States, or adhered to their enemies, giving them aid and comfort. It is only we, the subjects, that can commit treason, or expiate its guilt. No man, or set of men, can, without our consent, involve us in the awful crime, or subject us to the awful penalties, of treason.

As a State cannot commit the crime of treason, it cannot incur a forfeiture of its powers and functions as the penalty of treason. The punishment provided for traitors is the result of judicial trial, conviction, and judgment. How to indict a State, the constitution of the court, the mode of trial, the form of judgment, and process of execution, yet exist *in gremio legis*. Nor is it material that the acts of the State officers have the sanction and support of the majority of the people of the State. Within the proper sphere of the State Government, the rule of the majority will prevail, except so far as it is restrained by the organic law; but the majority of the voters of the State cannot deprive the minority of the rights secured to them by the Constitution of the United States. Some of these rights may be kept in abeyance. Their exercise may be overborne by superior physical force. They may sleep; but it is not the sleep of death. They are integral parts of the Constitution, and can only perish when the Constitution perishes.

The State of Tennessee, for example, has passed an ordinance of "secession." She has allied herself with the other seceding States. Her vote of secession is sustained by force. Upon this new and startling theory of the Constitution, she has already incurred a forfeit-

ure of all those functions and powers essential to the continued existence of the State as a body politic. The voice of her eloquent senator is heard in the Capitol; her venerable judge sits in the highest judicial tribunal, and exercises the highest functions of Government; her representatives mingle in our councils; her loyal citizens greet with tears of joy the banner of our advancing hosts, — their hope and our hope, their pride and our pride. Yet, upon this theory, there is no Tennessee: "the Commonwealth itself is past and gone." Its citizens can no longer be represented in this House or the Senate. The courts of the United States are closed against them (Corporation of New Orleans *vs.* Winter, 1 Wheaton Rep., 91). The requisition upon the State for troops was a mistake. The direct tax was a mistake. Its citizens, under the shield of the Constitution, are outlaws, and in their own homes exiles. If such be the effects of a void act of secession, we should be grateful we are not called upon to witness the results of a valid one. There is nothing in the doctrines of nullification or secession more disloyal to the Constitution, more fatal to the Union, than this doctrine of State suicide. It is the gospel of anarchy, the philosophy of dissolution. Nor by carrying out this doctrine of the destruction or forfeiture of the State organization would any thing be gained for the cause of freedom. Slavery exists by the local, municipal law; and would not be abolished, unless you go one step further, and hold, that, with the loss of the State organization, the institutions, laws, and civil relations of the States perish. Now, in case of conquest, even though the people of the conquered territory change their allegiance, their relations to each other and their rights of

property remain undisturbed. The modern usage of nations, which has become law, would be violated if private property should be generally confiscated and private rights annulled (United States *vs.* Percheman, 7 Peters, 51; 3 Phillemore, p. 743). When, therefore, States were reduced to Territories, the National Government could not abolish slavery therein, except under the right of eminent domain and by giving just compensation.

If we are right as to the nullity of the acts of secession, we may proceed to inquire whether the fact, that the seceding States have attempted to form a new alliance or confederation, will effect the result. Upon the plainest letter of the Constitution, as well as by its entire spirit, these acts of confederation are void. Continuing as States in spite of their ordinances, they were expressly forbidden to enter into any treaty, alliance, or confederation, or into any agreement or compact, with another State or with a foreign power (Constitution, art. 1, sect. 10). Neither by secession nor confederation have they changed their legal relation to the Union and the Constitution of the United States. They are still members of the Union, foregoing for a time its privileges, but subject to its duties, bound to it by a cord which the sword of successful revolution can alone sever.

What, then, it may be asked, is the legal character of this great insurrection? The answer is, It is a rebellion of citizens of the United States against the Government of the United States; an organized effort to subvert and overthrow its authority, and to establish another Government in its stead. Nothing can be more explicit than the proclamation of April 15, 1861: —

"The laws of the United States have been for some time past and now are opposed, and the execution thereof obstructed, in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law.

"Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union, to the aggregate number of seventy-five thousand, *in order to suppress said combinations, and to cause the laws to be duly executed.*

"I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the *integrity*, and the *existence of our National Union* and the perpetuity of popular Government, and to redress wrongs already long enough endured."

The State organizations have been found convenient, and have been used for the purposes of the Rebellion. Those of counties and cities have been used for the same ends. In either case, it was an entire perversion of their functions; and the action is none the less illegal and revolutionary on that account. A State, as such, having no power to engage in war with any other State or with the United States, cannot interpose its shield between the Government of the United States and its subjects committing treason by levying war against it; nor is such levying war any the less treason because the traitors held places of trust in the State Governments, and perverted the functions of those Governments to their base ends. Morally, it is an aggravation of the offence. It does not change its essential legal character.

In the Convention for forming the Constitution of the United States, Luther Martin, of Maryland, was anxious to insert a provision to save the citizens of the States

from being punishable as traitors to the United States when acting expressly in obedience to the authority of their own States. The provision offered by him was, —

"That no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States, under the authority of one or more of the said States, shall be deemed *treason*, or *punished as such*; but, in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and of nations."

This proposition was rejected, Mr. Martin says, with much feeling, because the leading members of the Convention meant to leave the States at the mercy of the National Government. The more obvious reason is, that it was inconsistent with the whole theory of the Constitution, which, springing from the people of the United States, acted directly upon them as its subjects, and with a force which no law or ordinance of a State could impair.

This, then, is not a conflict of States; nor is it a war of countries or of geographical lines. It is a conflict between Government and its disobedient subjects. He only is the enemy of the United States who is committing treason by levying war against the United States, or giving aid and comfort to those who do. The loyal, faithful subject of the United States, wherever on the soil of his country he may have his home, is not the enemy of his country. No subtilty of logic, no ingenuity of legal construction, no misapplication of the laws of international war to this contest, can change the nature of things; can convert loyalty into treason, or devotion into hostility. If there be to-day in Ten-

nessee or Georgia, or South Carolina even, a loyal subject of the United States, "faithful among the faithless found," the Government is not at war with him. I am aware, that, as to property taken on the high seas, some of the district courts of the United States have held otherwise; but I venture to predict, that the court of last resort will affirm the doctrine, stated by Mr. Justice Nelson of that court, to be good sense and sound law: —

"On the breaking-out of a war between two nations, the citizens or subjects of the respective belligerents are deemed by the law of nations to be the enemies of each other. The same is true, in a qualified sense, in the case of a civil war arising out of an insurrection or rebellion against the mother-government. But, in the latter case, the citizens or subjects residing within the insurrectionary district, not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such. This distinction was constantly observed by the English Government in the disturbances in Scotland, under the Pretender and his son, in the years 1715 and 1745. It modifies the law as it respects the condition of the citizens or subjects, residing within the limits of the revolted district, who remain loyal to the Government."

The difference between a war and a rebellion is clear and vital. War is the hostile relation of one nation to another, involving all the subjects of both: rebellion is the relation which disloyal subjects hold to the nation, not involving or impairing the rights of loyal subjects. The law may fail to protect obedient subjects; but it never condemns them. As between the Government, and its subjects in arms against it, the *legal* relation is not that of war, notwithstanding the war-power is used to subdue and reduce them to obedience. Though the Rebellion has assumed gigantic proportions, and the civil power is impotent to repress it, the array of numbers,

and extent of physical force, do not change its essential legal character. It is still treason, — the levying of war against the United States by those who owe to it allegiance. For this exigency the Constitution has provided. The war-power of the Government may be evoked "to execute the laws of the Union, and to suppress insurrection." In levying war against the United States, the rebels do not cease to be traitors, but are doing *the* thing in which the Constitution declares treason to consist (art. 3, sect. 3).

While using the powers and appliances of war for the purpose of subduing the Rebellion, we are by no means acting without the pale of the Constitution. We are using precisely the powers with which the Constitution has clothed us for this end. We are seeking domestic tranquillity by the sword the Constitution has placed in our hands. In the path of war, as of peace, the Constitution is our guide and our light, — the cloud by day, the pillar of fire by night.

While using the powers of war for executing the laws and subduing rebellion, we are, of course, bound and restrained by the laws of war. It is our duty and our privilege to respect the maxims of humanity and moderation by which the law of nations and of Christian civilization has tempered the spirit of modern hostilities. During the war, we may recognize in the rebels the rights of belligerents; may send them flags of truce; may make with them capitulations, cartels for exchange of prisoners; and extend to them the courtesies which mitigate, to some extent, the iron rigor of war. These things were done in the earliest stages of our Revolution, not only before the separation of the Colonies was declared, but before the idea of inde-

pendence had fairly taken possession of the public mind. But it was never supposed, that, by adopting the usages of civilized warfare, Great Britain was relaxing her hold upon the Colonies, or elevating them into independent powers. Nothing is, I think, plainer in principle, than that the recognition of these rights and the observance of these usages — *flagrante bello* — cannot affect the legal relation of the parties; does not divest the sovereign of his power, or release the subject from his duties, when the strife of arms ceases. It is only when rebellion has ripened into successful revolution, that the permanent legal relations of the parties are changed. The recognition of the "belligerent rights" of the rebels by foreign powers, can, as between the sovereign and his subjects, have no other or further effect. Such recognition (if known to the law of nations) proceeds upon the ground, that the *revolution is not accomplished, and that the connection is not dissolved.* Had this been done, the recognition would have been of their separate national existence.

In my humble judgment, Mr. Chairman, the "seceded States" (so called), and the people of those States, are to-day integral parts of the Union, over whom, when the conflict of arms ceases, the Constitution of the United States, and the laws made under it, will resume their peaceful sway. Traitors may perish; some institutions may perish: the nation will remain; and the States will remain, essential parts of the body politic. "The body is one, and hath many members; and all the members of that body, being many, are one body."

With this brief and imperfect development of the principles involved in this great controversy, I proceed to a more direct consideration of the subjects of confiscation and emancipation.

In seeking to know what this Government ought to do in relation to the confiscation of private property, or the emancipation of slaves, in the "seceding" States, the obvious question presenting itself to every mind at the threshold is, What is *the end* which the Government and the people are seeking to attain? There can be but one loyal answer to that question. It is to preserve the Union and the Constitution in their integrity; to vindicate in every part of this indivisible Republic its supreme law. No purpose, however humane, beneficent, or attractive, can divert our steps from the plain, straight path of sworn duty. What is writ is writ. In seeking to change it by force of arms, we become the rebels we are striving to subdue.

It is a plain proposition, that, in seeking to enforce the law, we are, as far as possible, to obey the law. We are not to destroy in seeking to preserve. The people do not require a bitter and remorseless struggle over the dead body of the Constitution. We may raise armies and navies, and pour out as water the treasure and life-blood of the people; but we can neither think nor act wisely, live well, or die well, for the Republic, unless we keep clearly and always in view the end of all our labors and sacrifices, — the Union of our fathers, and the Constitution, which is its only bond. No thoughtful man can believe there is a possibility of reconstructing the Union on any other basis; or that it is within the province of Congress, in any other but the peaceful way of amendment, to make the effort.

The bills and joint resolutions before the House, propose, with some differences of policy and method, two measures, — the confiscation of the property of the rebels, and the emancipation of their slaves. Some of

the resolutions propose the abolition of slavery itself, with compensation for loyal masters. It is my duty to examine, as briefly as I may, the wisdom, the justice, and the constitutionality of the measures proposed. And, first, of confiscation.

The propositions for confiscation include the entire property of the rebels, real and personal, for life and in fee. Within the class whose estates are to be confiscated are included not only those personally engaged in the Rebellion, in arms against the Government, but also those who adhere to them, giving them aid or comfort: so that within the sweep of the bills would be brought substantially the property of eleven States and six millions of people.

The mind instinctively shrinks from a proposition like this. It relucts to include in one "fell swoop" a whole people. It asks anxiously, if no consideration is to be had for different degrees of guilt; if the same measure is to be meted to those who organized the Rebellion and those who have been forced into it; if no consideration is to be given to the fact, that allegiance and protection are reciprocal duties; and that, for the last ten months, the National Government has found itself incapable of giving protection to its loyal subjects in the "seceding States," — neither defending them, nor giving them arms to defend themselves; and that, deprived of our protection and incapable of resistance, they have yielded only to superior force; if a wise Government is to forget the nature of man and the influences of birth, of soil, of home, of society, and of State, by which his opinions are insensibly moulded; and that this pestilent heresy of the right of secession, fatal as it is now seen to be, not only to the existence of good

government, but of social order itself, has been a cardinal article in the faith of a large portion of the people in the Southern States; and that they have been induced, by the arts and sophistries and falsehoods of unprincipled leaders, to believe that their future safety and well-being required the exercise of the right. Those leaders should atone for their crime by the just penalty of the law. But you cannot, says Burke, "indict a whole people: you cannot apply to them the ordinary rules of criminal jurisprudence." To state the proposition to confiscate the property of eleven States is to confute it; is to shock our common sense, and sense of justice; is to forget not only the ties of history and of kindred, but those of a common humanity; is to excite the indignation of the civilized world, and to invoke the interposition of all Christian governments.

It is said that just retaliation requires the confiscation of the property of the rebels. Doubtless nations may feel compelled to resort to measures of severe retaliation; it may be their only security against future outrage: but a firmly established government does not resort to cruelty and injustice because its rebellious subjects have done so. It must maintain a higher standard of rectitude and justice. Its object is, not vengeance, but to deter men from crime. It knows that harsh and severe punishments but rouse pity for the criminal, and indignation against the Government.

Nor will the difference between confiscation by the rebels and by this Government be overlooked. Our acts of confiscation, if within the limits of the Constitution, are effective and permanent: theirs, void in law, are temporary in their effect. The title to one square

inch of land will not be changed by any confiscation by the rebel authorities. Every man who has occupied the land of a loyal citizen under their pretended acts of confiscation will be liable for the full rent and damages to the estate. Every man who is in possession of personal property under them will be compelled to disgorge. Every debt paid under them into rebel treasuries will still be due to the loyal creditor. The restoration and indemnity will, I know, be imperfect. Many grievous wrongs will go unredressed; but every rebel, whatsoever functions he may have usurped, — judicial or executive, — who has invaded the rights of person or of property of a loyal citizen, will be liable to his last farthing for indemnity. So far, therefore, as our Government confiscates the property of rebels to its own use, it takes from the loyal citizen the sources to which he may justly look for redress.

The acts of general confiscation proposed would defeat the great end the Government has in view, — the restoration of order, union, and obedience to law. They would take from the rebels every motive for submission; they would create the strongest possible motives to continued resistance. In the maintenance of the Confederate Government, they might possibly find protection; in the restoration of ours, spoliation. *Spoliatis arma supersunt.* You leave them the great weapon of despair. Sallust said of the old Romans, "Majores nostri religiosissimi mortales nihil victis eripiebant præter injuriæ licentiam," — "Our ancestors, the most religious of men, took from the vanquished nothing but the license of wrong-doing," — "words," says Grotius, "worthy of having been said by a Christian."

It seems to be taken for granted, that our efforts to

suppress the Rebellion will be successful in proportion to the *severity* of the measures we adopt. The assumption is at war with the lessons of history and with the nature of man. The most vigorous prosecution of the war possible is best for the Government and its subjects in arms against it. But the war is means to an end. "Wise men labor in the hope of rest, and make war for the sake of peace." It is only when justice is tempered with mercy that it is justice.

Apart from the injustice and impolicy of these acts of sweeping confiscation, I have not been able to find in the Constitution the requisite authority to pass them. There are two aspects in which the legal question may be viewed, —*first*, the confiscation and forfeiture of property as the punishment for crime; *secondly*, under what has popularly been called the "war-power" of the Government.

Looking at confiscation as the penalty of crime, treason, or any lower grade of offence, some things seem to be plain: —

That such forfeiture can be created by statutes applicable only to offences committed after their passage. Congress cannot pass an *ex post facto* law (Constitution, art. 1, sect. 9).

The subject charged with treason may justly claim all the muniments and safeguards of the Constitution.

He cannot be deprived of life, liberty, or property, without due process of law (Amendments, art. 5); that is, judicial process, as understood from the days of Magna Charta.

He cannot be held to answer for a capital or otherwise infamous crime, except in cases arising in the land or naval forces, or in the militia when in actual service

in time of war or public danger, unless on presentment or indictment by a grand jury (*ibid.*).

After indictment, he must have a trial by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law (art. 3, sect. 2; Amendments, art. 6).

No attainder of treason can work a forfeiture, except during the life of the person attainted (Constitution, art. 3, sect. 2). By attainder is here clearly meant judicial attainder; as a bill of attainder (that is, an act of the Legislature) is, by a prior provision of the Constitution, expressly forbidden (art. 1, sect. 9).

These sacred provisions of the Constitution, which as common-law muniments of life, liberty, and property, have existed in substance for six centuries, — "the least feeling their care, and the greatest not exempted from their power," — lie directly in the path, and are fatal obstructions to any legislation confiscating property as the penalty of treason, except as the result of the judicial trial and sentence of the offender.

It has been assumed, — I think, without sufficient reflection, — that, under our laws against treason, the most obnoxious traitors even will escape the righteous punishment of their crimes, because they must be tried by a jury in the State and district wherein the offence shall have been committed. Their only escape will be by exile. Where war is actually levied against the United States, where bodies of men have been actually assembled to effect by force of arms their treasonable purposes, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be

considered as traitors (*Ex parte* Bolman, &c., 4 Cranch, 75). We have not, indeed, adopted the law of constructive presence, which holds that a man who incites or procures a treasonable act, is, by force of the incitement or procurement merely, legally present at the act. But it may be sufficient to constitute presence, if he is in a situation in which he can co-operate with any act of hostility, or furnish counsel and assistance to the parties if attacked (United States *vs.* Burr, 4 Cranch, 470). The modern facilities of communication greatly enlarge the field of co-operation. A commander at the end of a telegraph-wire, directing the assault upon a fort of the United States, or at a railroad station with troops ready to be moved to the assistance of the rebel army in action, is, in law, present at the overt acts of treason. The leaders of this Rebellion will be found, therefore, to have committed treason, and to be liable to indictment and trial in many States and districts in which a jury will be ready, upon adequate proof, to convict.

In the proposed measures, the thing sought to be done is the confiscation of the property of the rebel as the penalty of his offence, and the attainment of this end without the trial and conviction of the offender. Though, under the Constitution, upon a trial and *conviction* of a traitor, you can only take the life estate, these measures assume, that, without any trial or conviction, you may take the fee-simple. Our legal instincts shrink from such a proposition. Its intrinsic difficulties have been seen and felt; and a resort has been had to analogies and precedents, judicial and legislative, to find for it some sanction and support; I think, without success.

1. It is true, as has been said, that, under the Constitution, men may be deprived of life and property without

trial by jury. Cases arising in the land and naval forces, and in the militia when in actual service in time of war or public danger, are in terms excepted from the general rule (Amendments, art. 5); but the exception, instead of impairing, by the law of logic as of common sense, confirms the rule.

2. Property is taken for taxes, and certainly without trial by jury, where the tax, and mode of assessment, are valid; but this is under an express grant of power to Congress "to lay and collect taxes" (art. 1, sect. 8), the principle and general method of which were perfectly well understood when the Constitution was adopted. Nor does the exercise of this power, as has been suggested, take private property for public use without just compensation: on the contrary, the true and just theory of taxation is, that the price paid is the reasonable compensation for the protection and security of life, liberty, and property, which a wise and efficient government affords.

3. The forfeiture of goods for breach of the revenue-laws has slight, if any, analogy to the confiscation of property as a punishment for the crime of its owner. To Congress is given the power to "regulate commerce," and "to levy and collect imports;" and, of course, to prescribe the terms and conditions upon which goods may be imported. It may well avail itself of a familiar principle by which property used in violating, defeating, or defrauding the law is liable to forfeiture. Though the forfeiture of the common law did not, strictly speaking, attach *in rem*, but was a part or consequence of the judgment of conviction of the offender, this doctrine was never applied to seizures and forfeitures created by statute *in rem*, and cognizable on

the revenue side of the exchequer. The thing was then primarily considered as the offender, and the offence was attached to *it*. The same principle is applied to proceedings *in rem*, and seizures in the admiralty (2 Wheaton, The Palmyra). It is upon this distinction that the statutes of July 19 and of Aug. 6, 1861, find their support. The principle is, that the thing used in violating the law may be seized and condemned without a judgment upon the guilt of the owner.

I proceed to inquire how far, if at all, the powers of Congress are enlarged by the existence of this Rebellion, and the use of the appliances of war to subdue it.

It would seem to be plain, that the resistance of any portion of the people to the Constitution and laws cannot operate to confer upon Congress any new substantive power, or to abrogate any limitations of the powers of Congress which the people have imposed. When the Constitution intends that the existence of war or rebellion shall put an end to any restriction on the power of the Government, it says so: when it does not say so, the fair inference is that it does not mean so. Examples of such removals of restraint are found in article one, section eight, providing that the privilege of the "writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it;" and in article three of the Amendments, forbidding, in time of peace, the quartering of soldiers in any house without the consent of the owner, but in time of war permitting it to be done "in a manner to be prescribed by law."

Engaged in suppressing a great and formidable rebellion, the Government may use the instrumentalities of war, so far as they are adapted to the end: but it is

never freed from the restraints of the Constitution; can never rise above it. The Constitution is never silent in the midst of arms. In war, as in peace, it is the supreme law; itself *salus populi et suprema lex.*

When Government is compelled to use the power of war, it observes its limitations. How far, in the use of this power, it may confiscate, or subject to forfeiture, private property, is the next question before us.

Some things are tolerably well settled. That property used in promoting the rebellion, in levying war against the United States, is lawful prize of war. This would include the arms, munitions, and provisions of war, in actual use or procured for the purpose. The rule extends to goods used, not strictly as munitions or implements of war, but so as to defeat the military and naval operations resorted to to subdue the rebellion: as goods on their way to relieve besieged towns or forts; or ships or cargo violating a blockade, or proceeding to or from ports with which commercial intercourse has been interdicted. It may extend to ships and cargo upon the high seas, the property of those levying war against the United States; enemies, not because of their domicile or residence upon one part rather than another of the territory of the Union, but because they are in arms against it.

Perhaps we should add to these, requisitions or contributions, within military districts, levied upon those at war with the Government, for the support of the invading army. Such requisitions were, however, regarded by Wellington, a great statesman as well as great commander, as iniquitous; as a system for which the British soldier was unfit. I would refer also to the excellent remarks on this subject by President Woolsey,

in his admirable Introduction to "International Law," p. 304.

Beyond the points suggested, it is believed the usages of international war do not extend. By the modern usages of nations, private property on the land is exempt from confiscation. This exemption, Mr. Wheaton says (and there is no higher authority), is now held to extend "to cases of the absolute and unqualified conquest of the enemy's country" (Wheaton's "Elements of International Law," p. 421). We refer also, as tending to the same result, to Vattel, book 3, chap. 8, sect. 147; to 1 Kent's "Commentaries," pp. 102, 104; 3 Phillimore, p. 140; Woolsey, p. 304. To this mitigated rule of war, there are doubtless exceptions. Of these, Mr. Wheaton says,—

"The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities. The same general rule which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary in order to accomplish the just ends of war, it may be lawfully done; but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war." — Page 421.

The exceptions growing out of military exigencies, and measured and governed by them, cannot be foreseen and provided for by legislation, but must be left, where the law of nations leaves them, with the military commander.

It has been said that these acts of general confiscation find support under the provision of the Constitution which authorizes Congress "to make rules concerning captures by land and water." The Constitution does not define the meaning of the word "captures." It refers us in such cases to the law of nations, as in others to the common law. Congress has power to declare "war." What war is, the just causes of war, the rights and duties of nations in conducting it, are to be found in the law of nations. The "captures" referred to are very plainly not seizures of property under legal process, confiscation, or forfeiture, but the taking of enemy's property by force or strategy, *jure victoriæ*. The title is acquired by capture, and liable to be lost by recapture. To make rules concerning "captures" is not to make rules in conflict with or beyond the law of nations. The extent to which the power conferred by the law of nations shall be exercised, and the disposition to be had of captures when made, are the proper subjects of municipal law and of the provision of the Constitution.

The case of Brown *vs.* the United States (8 Cranch, 110) has been cited as expressly deciding that Congress has power to pass a confiscation bill. I submit, with great respect, that it decides no such thing. The only point *decided* in the case was, that British property found in the United States, on land, at the commencement of international hostilities (war of 1812), could not be condemned as enemy's property, without an act of Congress for that purpose. The court, dealing with a question arising under war with a foreign nation, had no occasion to consider the powers or duties of Congress in the case of rebellion. The *discussions* of the court recognize a distinction between the right of the sove-

reign to take the persons and confiscate the property of the enemy wherever found, and the mitigations of the rule which the humane usages of modern times have introduced. With all my reverence for the great magistrate who delivered the opinion of the court, I must be permitted to say, that usage is itself the principal source of the law of nations, and that these humane usages have become the rules of war in Christian States. The law of nations, says Bynkershoek, is only a presumption founded on usage (*De foro Legatorum*, chap. 18, sect. 6).

It is suggested, that, if the confiscation of private property violated the law of nations, the courts could not overrule the interpretation of that law by the political department of the Government, and that no other power could intervene. Possibly this may be so; but surely it is not intended that we shall violate the law of nations in dealing with our subjects, because there is no appeal or redress for the subject. It is in the exercise of irresponsible power that the nicest sense of justice, and the greatest caution and forbearance, are demanded. In suppressing a rebellion so atrocious, marked by such fury and hate against a Government felt only in its blessings, forbearance seems to us weakness, and vengeance the noblest of virtues; but, in our calmer moments, we hear the Divine Voice: "Vengeance is mine; I will repay."

I conclude what I have to say upon this branch of the subject with the remark, that, in substance and effect, the bills before the House seek the permanent forfeiture and confiscation of property, real and personal, without the trial of the offender. I am unable to see how, under the Constitution, that result can be reached.

No man can foresee to-day what policy a severe and protracted struggle *may* render necessary. It is sufficient to say, that into such a war of conquest and extermination the people of the United States have no *present* disposition to enter. They have too thorough a conviction of the capacity of the Government to subdue the Rebellion by the means the Constitution sanctions, to be desirous of looking beyond its pale.

Upon the legal aspect of the question, it may be stated, as a general proposition, that Congress, in time of peace, has no power over slavery in the States. By that is meant the institution itself; for the National Government may, in my judgment, forfeit the right of the master in the labor of the slave, as a penalty for crime of which the master shall be convicted; and, when so forfeited, it may dispose of the right as it sees fit. Nor is there any intrinsic difficulty in the use of this species of property under the right of eminent domain. If the Government were constructing a fort or digging an intrenchment, it might hire this species of labor, or, if necessary, take it, as it might other labor or property, giving reasonable compensation therefor.

The provision as to the return of fugitives from service cannot be deemed an exception to the general rule before stated; for the provision applies to escapes from one State into another, and not to escapes within the State. Of which we may remark, in passing, that, as to the former class, the power of the Government is strictly civil, to be executed by judicial process; and that, as to the latter, the National Government, in time of war or peace, has no concern.

Nor would an act of the National Government liberating the slaves within a State, having the consent of the

State and providing compensation for the masters, militate with the rule. *Conventio vincet legem.* The consent of the State would relieve the difficulty.

But the question arises, how far the existence of the Rebellion confers upon Congress any new power over the relation of master and slave. Strictly speaking, no new power is conferred upon any department of the Government by war or rebellion; but it may have powers to be used in those exigencies which are dormant in time of peace. Such, for example, are the power to call out the militia (art. 1, sect. 8), to try by martial law cases arising in the militia (Amendments, 5), to suspend the writ of *habeas corpus* (art. 1, sect. 9), to quarter troops in private houses (Amendments, 3); but, when the National Government is called to the stern duty of repressing insurrection or repelling invasion, may not new power over the relation of master and slave be brought into action? Such, I think, is the result.

A plain case is presented by slaves employed in the military and naval service of the rebels. If captured, they may be set free.

The Government may refuse to return a slave to a master who has been engaged in the Rebellion, or suffered the slave to be employed in it.

It may require the services of all persons subject to its jurisdiction by residing upon its territory, when the exigency arises, to aid in executing the laws, in repressing insurrection, or repelling invasion. This right is, in my judgment, paramount to any claim of the master to his labor, under the local law. There might be a question of the duty of the slave to obey; but the will of the master could not intervene. His claim, if any, would be a reasonable compensation for the labor of his slave.

But, though the power may exist, there is, with prudent and humane men, no desire to use it. Nothing but the direst extremity would excuse the use of a power fraught with so great perils to both races; and the glorious triumphs of our arms, evincing our capacity to subdue the Rebellion without departure from the usages of civilized warfare, have indefinitely postponed the question.

There is one other exigency in which the relation of master and slave must give way to military necessity. If the commander of a military district shall find that the slaves within it, by the strength they give to their rebellious masters, — by bearing arms, or doing other military service, or acting as the servants of those who do, — obstruct his efforts to subdue the Rebellion, he may deprive the enemy of this force, and may remove the obstruction, by giving freedom to the slaves. This, it is apparent, is not a civil or legislative, but a strictly military right and power, springing from the exigency, and measured and limited by it, to be used for the subduing of the enemy, and for no ulterior purpose. If the commander-in-chief and the generals under him shall observe faithfully this distinction, the use of the power ought to be no just ground of complaint. If, in consequence of the protraction of the war, the effect of the use of this power should be to put an end to slavery in any of the States, or to weaken and impair its force, we may justly thank God for bringing good out of evil.

In my judgment, it would be impracticable for the Legislature, even if it had the power, to anticipate by any general statute the exigencies or prescribe the rules for the exercise of this power. The Legislature and the people will be content to leave the matter to the sound

discretion and sound patriotism of the magistrate selected to execute the laws.

To avoid misconstruction, I desire to say that the power of Congress over slavery in this District is absolute; that no limitation exists in the letter or spirit of the Constitution or the acts of cession. All that is requisite for abolishing slavery here is *just* compensation to the master. Equally absolute, in my judgment, is the power of Congress over slavery in the Territories.

Mr. Chairman, in a letter to a friend, published on the first day of the last year, I ventured to say that secession should be resisted to the last extremity, by force of arms; that it cost us seven years of war to secure this Government, and that seven years, if need be, would be wisely spent in the struggle to maintain it; that for this country there was no reasonable hope of peace but within the pale of the Constitution, and in obedience to its mandates. The progress of events has served only to deepen those convictions. They are as firmly rooted as my trust in God and his providence. Whoever else may falter, I must stand by the Constitution I have sworn to support. I am not wise enough to build a better. I am not rash enough to experiment upon a nation's life. There is, to me, no hope of "one country" but in this system of many States and one nation, working in their respective spheres as if the Divine Hand had moulded and set them in motion. To this system the integrity of the States is as essential as that of the central power. Their life is one life. A consolidated government for this vast country would be essentially a despotic government, democratic in name, but kept buoyant by corruption, and efficient by the sword.

Desiring the extinction of slavery with my whole mind and heart, I watch the working of events with devout gratitude and with patience. The last year has done the work of a generation. By no rash act of ours, much less any radical change in the Constitution, shall we hasten the desired result. If, in the pursuit of objects however humane; if, beguiled by the flatteries of hope or of shallow self-conceit; if, impelled by our hatred of treason, and desire of vengeance or retribution; if, seduced by the "insidious wiles of foreign influence," — we yield to such change, we shall destroy the best hope of freeman and slave, and the best hope of humanity this side the grave.